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Issue Date: 20 December 2004.....

In the Matter of:

ANTHONY F. GONZALEZ,
Complainant,

Case No. 2004-SOX-00039

v.

COLONIAL BANK,
Respondent.

&
THE COLONIAL BANCGROUP. INC.,

Respondent.
.....

ORDER DENYING MOTION TO RECONSIDER ORDER ON MOTION FOR LEAVE TO AMEND

Respondents, Colonial Bank and The Colonial BancGroup, Inc. request reconsideration of an Order Granting Motion To Amend Complaint issued on August 17, 2004 (Order). Respondents offer two reasons for reconsideration: 1) *Wilson v. Bolin Associates, Inc.*, 91-STA-4 (Sec'y Dec. 30, 1991), a case cited in the Order as support for its reasoning, "does not stand for key propositions for which the Court cited it"; and 2) the Order was given "an effect that by definition, it cannot have and, in so doing, granted relief that Gonzales did not request."

I

Respondents are correct that *Wilson* was cited as support for granting the Complainant's Motion to Amend Complaint. The Order reasoned that the Secretary in *Wilson* agreed with the administrative law judge's decision to allow the complainant to amend his complaint to add an individual as a party because the individual was reasonably within the scope of the original complaint, received notice from the outset of the case, and participated in the investigation and all proceedings.

Respondents argue that the Order misinterprets *Wilson* because the Order states that the complainant requested that the complaint be amended whereas reference to the administrative law judge's decision in *Wilson* discloses that the request to amend was made by the Assistant Secretary as the prosecuting party. Respondents are correct. However, Respondents are arguing a difference without substance. The cogent point is that the Secretary affirmed the Judge's decision amending the complaint. Whether the motion to amend was made by the prosecuting party, complainant or respondent is of no consequence to the principle espoused by the case.

Respondents also argue that the Order's reference to the Secretary affirming the amendment to the "complaint" in *Wilson* is a "misapprehension of the law" because the Secretary referred to the amendment of a pleading, not to the amendment of a complaint. Respondents state: "[*Wilson*] was about an amendment by the Assistant Secretary, as prosecuting party, to what the Secretary and the Administrative Law Judge described as "the pleading." Respondents are incorrect in their reading of *Wilson.* Initially, the Secretary's decision in *Wilson* does not use the term "pleading"; rather it references the *complaint*, as in "the amendment…was reasonably within the scope of the original *complaint*." Further Respondents misconstrue the role of the Assistant Secretary. There cannot be an amendment by the Assistant Secretary. The Assistant Secretary becomes the prosecuting party when the case is before the administrative law judge, and as a party, may move the administrative law judge to amend the complaint. Such is what was done in *Wilson.*

Respondents further argue that although *Wilson* was relied on by the Order as support for its finding that Complainant's amendment should relate back to the filing of the original complaint, *Wilson* makes no mention of the relation back issue. To the contrary, the reasoning of the Secretary shows that relation back was a concern in sustaining the Judge's decision to amend the complaint. The Secretary's concern was alleviated by her finding that the additional defendant "received notice from the outset of the case and participated in the investigation and all proceedings." The Secretary also held that the amendment was consistent with cases arising under Fed. R. Civ. P. 15, the purpose of which is to permit amended complaints to relate back. Also, as observed by Respondents, the Secretary cited three cases in support of its position. All three cases discuss permitting the addition of an amendment that relates back.

II

Respondents' second argument is that the Order provided relief that the Complainant did not ask for and the rules do not permit. Respondents' argument is rejected. Complainant moved for leave to file an amended complaint. His motion was granted and the relief granted, the amendment, was the relief requested.

Respondents' argument is based on their interpretation of the undersigned's August 21, 2001 decision in *Allen v. EG&G Defense Materials*, wherein a motion to reconsider and reverse a decision of an administrative law judge granting summary judgment was granted because the respondent did not answer a complaint filed with OSHA. The *Allen* decision is not relevant to the issue raised here. *Allen* stands only for the proposition that an initial complaint filed with OSHA is not a complaint within the meaning of 29 CFR § 18.5(a), such that an answer must be filed.

Accordingly, Respondents motion to reconsider Order Granting Motion To Amend Complaint is denied.

A
Thomas M. Burke

Associate Chief Administrative Law Judge